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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & Co. and BEITZELL & Co., INC.,
Petitioners

v.

UNITED STATES OF AMERICA

PETITIONERS REPLY BRIEF TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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This brief is filed under paragraph 4 of Rule 24 to point out arguments first raised in the memorandum in opposition that misstate (a) the decision of the Ninth Circuit Court of Appeals in the *Parrott* case and (b) the position of the petitioners. A third error of the respondent is the unsubstantiated statement that the interests of foreign governments were made apparent in the *Bercut* and *China Liquor* cases in which this court denied certiorari.

The Parrott Case

In an effort to counter petitioners' argument that the decision of the Court of Customs and Patent Appeals in the pending case is in conflict with the decision of the Ninth Circuit Court of Appeals in the *Parrott* case, the respondent has misstated the opinion of the latter court. The respondent avers that the court held that the United States tax attached to the rum produced in the Virgin Islands "as soon as the distillation was complete." (Memorandum in opposition page 6).

Actually what the court held in *Parrott* was that the tax on rum *produced in the United States* attaches at the instant the distilled substance is in existence. (156 F. 2d 947) Then the court held that Congress intended that the tax on Virgin Islands rum *would be the equivalent* of that on domestic rum, that is the amount which *would have* attached as soon as the distillation was complete. (page 948)

The Court did not say that the tax attached to the rum in the Virgin Islands. That would have been a strange interpretation of a statute that imposed the tax on articles *coming into* the United States from the Virgin Islands.

However, the respondent's misstatement of the court's decision has given us another opportunity to note how parallel are the questions in *Parrott* and in the pending case.

Petitioners' Point

In discussing the crucial problem of "like situations" on page 3, the memorandum in opposition attributes to the petitioners a position they have never taken and as

proof that petitioners are in error cites a possibility that domestic spirits could be withdrawn in bulk at below proof and thereby become subject to the wine-gallon tax which petitioners contend discriminates against imports.

Petitioners have never contended that the tax is discriminatory in the case of bulk spirits. Indeed, in their initial brief to the Customs Court dated April 28, 1967, petitioners agreed that the tax could apply to bulk domestic spirits and therefore does not discriminate against bulk imports. (page 11)

Petitioners' case is that the tax does discriminate against bottled imports, that this is contrary to the national treatment provisions of the treaty with Ireland and that section 7852(d) of the Internal Revenue Code makes any tax provision inapplicable when contrary to the treaty.

To support the position that the tax is discriminatory, petitioners have cited section 5006 (new in the 1954 Code) and 5233(b) that preclude determination of the tax on domestic bottled spirits on the basis of wine gallons. This is the argument which the respondent says is in error because the wine-gallon tax might be determined on domestic bulk spirits. Petitioners ask the court to reject this misstatement of their position and to conclude that the respondent has not been able to make a relevant response.

Interests of Foreign Governments

On page 5 of the memorandum it is stated that "In both cases where petitions were filed with this Court [i.e., *Bercut* and *China Liquor*], the interests of foreign governments were made apparent." The record in

these cases fails to show any participation therein by any foreign government—nor does it show how their interests were otherwise "made apparent" to this Court. To argue, as was argued in at least one of these petitions, that there are commercial benefits in bottling distilled spirits abroad is a far cry from showing the interests of foreign governments in the over all national treatment treaty issue. Contrast this with the fact that in this case the British and Irish Governments have stated their position to this Court—as has the Commission of the European Communities (i.e., the Common Market countries). Only *Schieffelin* (not *Bercut* and *China Liquor*) poses the national treatment treaty issue free from the defense of the Protocol to GATT and the interested governments now are asking for their "day in Court" to establish their treaty rights.

Over-All Question

There remains one over-all observation regarding the Memorandum In Opposition. The Government appears to be stating that whether or not the U.S. is carrying out its treaty obligations with 76 other countries is not an important question for this Court to determine. We ask this Court: Is that true?

Respectfully submitted,

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October 5, 1970